Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1834

COCA-COLA BOTTLING COMPANY OF MEMPHIS,
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION NO. 1196,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner, Coca-Cola Bottling Company of Memphis, prays that a Writ of Certiorari issue to review the judgments of the United States Court of

Appeals for the Sixth Circuit entered in case no. 75-2172 and in case no. 78-1104.

OPINIONS BELOW

The opinions of the Court of Appeals (Appendix 172-173 and 4-6) are not yet officially reported. The decision of the United States District Court for the Western District of Tennessee is reproduced herein. (Appendix 174-180). The National Labor Relations Board's two decisions and orders are reported at 232 NLRB No. 125 (Appendix 14-144) and at 239 NLRB No. 183 (Appendix 7-13).

JURISDICTION

The judgments of the Court of Appeals for the Sixth Circuit were entered in case no. 75-2172 (Appendix 172-173) on February 22, 1980, and in case no. 78-1104 (Appendix 4-6) on February 25, 1980. A timely petition for rehearing *en banc* was denied on April 3, 1980. (Appendix 3), and this petition for certiorari was filed within 90 days of that date. A 30 day stay of mandate of the two Court of Appeals judgments was granted to permit the filing of this petition. (Appendix 1-2) This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. May the National Labor Relations Board bypass its own procedures for safeguarding the freedom of employee choice by changing the certified bargaining representative without an election?

2. Should employees' rights to an election, when an uncoerced majority of such employees have signed a petition repudiating their union, be sacrificed in favor of stability of bargaining relations?

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Section 151, *et seq.*), for the convenience of the Court, are set forth below:

Section 1 . . . It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and *by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing,* for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection. (Emphasis added).

Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended (61 Stat. 140, 29 U.S.C. 158), provide:

> Section 8. (a) It shall be an unfair labor practice for an employer—

> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7;
>
> . . .
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

A portion of Section 9(a) of the same Act (61 Stat. 143, 29 U.S.C. 1559) is also herein set forth:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purpose, shall be the exclusive representatives . . .

STATEMENT OF THE CASE

This case arises in a factual situation not atypical in the current American industrial scene — the merger of two national unions. The issue is whether a concern for the stability of collective bargaining may be permitted to override employee participation in such mergers and to inhibit the right of such employees to designate their collective bargaining representative.

On June 28, 1968, the National Labor Relations Board certified the International Union of United Brewery, Flour, Cereal, Soft Drink and Distillery

Workers (herein called "Brewery Workers") as the bargaining representative of Petitioner's (herein called the "Company") production and maintenance employees. On November 12, 1971, the Company and the Brewery Workers and its local Union No. 196 (herein "Local 196") executed a new collective bargaining agreement effective from November 12, 1971 to November 12, 1974. The bargaining unit consists of approximately 450 employees.

In September, 1973, the Brewery Workers entered into a "Merger/Affiliation Agreement" with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein called "Teamsters") supplemented in October by a "Memorandum of Understanding." The agreements terminated the rights of local unions under the constitution of Brewery Workers and immediately subjected them to the provisions of the agreement and the constitution of the Teamsters, including charter provisions, upon the issuance of charters to them. Thereafter, the chartered local unions would be required to remit per capita taxes, initiation fees and other obligations as set forth in the Teamsters constitution to the Teamsters and be governed in all other respects by such constitution. The locals were required to affiliate with respective joint councils and area conferences of the Teamsters and to affiliate with a National Conference of Brewery and Soft Drink Workers. Negotiations by local unions as well as economic or other action in support of collective bargaining positions or labor dis-

putes would be governed by specific provisions of the Teamster constitution.

Thereafter, all property and assets of Brewery Workers were transferred to the Teamsters. Teamsters assumed only such debts and obligations which had been disclosed and accepted by it. The Teamsters were excepted from all liability for breaches of contracts or agreements to which Brewery Workers or one of its former locals were parties. The number of former Brewery Workers representatives to be hired by the Teamsters would vary with the number of members in local unions of the Brewery Workers which filed applications by December 31, 1973.

The employees of the Company did not participate in the decision of Local 196 to affiliate with the Teamsters as shown in the minutes of its meetings. On October 3, 1973 its then business manager told employees that he would attend a convention in November in Cincinnati and would vote according to what he thought would be for the benefit of all. On November 7, 1973, there was a general discussion among the membership on the merger, but the business manager was at the convention pertaining to the merger.

On November 16, 1973, Teamsters issued a local union charter to "Local Union No. 1196" and on November 21, 1973 a charter contract was signed. On December 5, 1973, the president of Local Union No. 196 announced at the regular membership meeting

that "we are now Teamsters Local 1196." At that same meeting: the business manager resigned; employees were told that the union would have to move from its present location; employees were told that their dues were being increased to $8.00 a month, the minimum dues for Teamsters; employees complained that they had not received any notification or letter about joining the Teamsters union; the president apologized for questions he could not answer about the affiliation; the business manager informed the employees that the Teamsters International constitution had superseded their local bylaws; and a "new" executive board for the local was nominated, seconded and accepted.

On March 3, 1974, after the Company had declined to recognize the new Teamsters Local 1196 as representative of its production and maintenance employees, a vote was held at a Teamster local union hall on the issue of affiliation. Voting rights were restricted to 212 people, 122 of whom had been on dues checkoff to Local 1196 and 90 additional employees who had signed Teamsters dues checkoff cards. Eighty-one members voted with 78 in favor and 3 opposed. Other members of the local, employed by other employers, voted separately on the change in affiliation, 119 in favor, 1 opposed.

The new Teamsters Local 1196 filed a petition with the National Labor Relations Board seeking to amend the certification to substitute itself for Brewery Workers. The Board's Regional Director, in amending the

certification, concluded that Teamsters Local 1196 was a continuation of Local 196 and that the private election in which only union members participated was a valid ratification of the affiliation. (On July 8, 1974, the Board denied the Company's request for review of such decision).

The Company declined to extend recognition to Teamsters Local 1196 and an unfair labor practice charge was filed. This is the statutory method by which a company secures Court review of a Board decision involving questions concerning representation. Sections 10(e) and (f)., 61 Stat. 140, 29 U.S.C. 160.

The Board's decisions, enforced without discussion by the Court below, concluded that, notwithstanding the disappearance of the certified bargaining representative in the merger and the totally changed methods by which the newly chartered local could conduct its affairs, the changes were essentially an internal union affair which could be decided solely by a vote of the union members. Thus, whether employees would be represented by a Teamsters union or no union at all was decided in balloting conducted, not by the Board itself, but by the very party seeking representative status among an electorate restricted to those most likely to cast favorable ballots.

In September, 1974, approximately 330 employees signed in support of a petition for a Labor Board conducted election to decertify Teamsters Local 1196 as

their collective bargaining representative. Initially, the National Labor Relations Board, in a decision later vacated, held that such a petition, emanating from the employees, created a question of representation. (Appendix 149-171; 155) In a subsequent decision, the National Labor Relations Board refused to find that a question of representation existed and required the company to bargain with Teamsters Local 1196, a directive enforced by the Court below. Although the Board found that, in ordinary circumstances, the Company "could rest a doubt" upon such a petition (Appendix 125-126, fn. 77), it refused to acknowledge that the doubt demonstrated a question concerning representation because the Company had elected to test the amended certification by refusing to bargain.

It is upon the issue of the absence of employee choice — twice refused — that certiorari is now sought. The Board, with Court approval, first denied employee participation in a change of collective bargaining representative. The choice of employees, demonstrated in an uncoerced petition, was again denied legal effect, and the employees were cast into the escapeless clutches of their new collective bargaining representative.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Raises An Important Question of Administration Of Federal Law Which Should Be Settled By This Court.

The national labor policy rests upon twin cornerstones — encouraging the practice and procedure of

collective bargaining and protecting the freedom of employees to designate their own representatives. In this case the former has been accorded paramount status to the exclusion of the latter. Yet neither purpose has legislative primacy. Each case must strike a proper balance, when the purposes conflict, to achieve a result compatible with the total policy of the Act.

The Board's current policy is that in a change of affiliation the only effect of an amendment of certification is to reflect a name change and that the representative character of the bargaining agent has not been altered. This policy, blinded to facts, can, if allowed to continue, dramatically affect the nation's workforce to the detriment of employee rights. Its growing importance is exemplified by the proliferation of mergers among national unions presently in progress. Here, the certified representative, Brewery Workers, had passed from existence; the employees became members of an entirely new international union; the relationship of their local union to its international totally changed under the new constitution; and, the bylaws, number of officers, dues structure, and concerted action obligations were changed. Despite these facts, the Board concluded that the identity of the bargaining representative had continued essentially unchanged. Only an irrebuttable presumption, grounded in the policy that bargaining not be interrupted to ascertain employee choice, could support such a conclusion. In consequence of the application of this policy, certification was amended, based upon a belated ratification by an

electorate artificially restricted by the designated beneficiary of the vote. The Board's professed requirement for amendment is that the identity of the representative has continued essentially unchanged and that the *members of the union* have been afforded an opportunity to consider and vote on the proposed changes through a democratic process. See, *e.g., East Dayton Tool & Die Co.*, 190 NLRB 577 (1971); *Hamilton Tool Co.*, 190 NLRB 571 (1971).

That the Board needs the guidance of this Court's authority in resolving the conflict of policy is demonstrated by its own changes in policy and by continued disagreement among Board members in resolving the problems created by restriction of employee free choice. The currency of present policy is only as old as the last decision in this case. On the same day, January 3, 1979, the Board reaffirmed its decision in a case involving the affiliation of a certified independent union with an international union. *Amoco Production Co.*, 239 NLRB No. 182, 100 LRRM 1127, rem'd for further findings, ____ F.2d ____ (5th Cir. March 7, 1980), 103 LRRM 2810. Two members dissented. Member Jenkins accepted the validity of a private election but would grant an amendment of certification only if *all* employees in the bargaining *unit* were afforded an opportunity to participate in the selection. Member Pennello argued that no private vote should be given effect, that the impact of the change upon employees created a question concerning representation, and such questions could properly be resolved only in an elec-

tion conducted by the National Labor Relations Board. The *Amoco Production Company* decision specifically overruled a prior holding, in *Jasper Seating Co.*, 213 NLRB 1025. There the Labor Board had refused an amendment of certification because nonmembers had been barred from the vote. The difference in the two decisions is due to a change in composition of the members of the National Labor Relations Board. So fundamental a question of employee rights should not be dependent upon fluctuation of appointments.

This factual situation demonstrates that continued identity of the bargaining representative, in reality, is a matter of policy definition rather than one of fact. In other words, if it be affiliation, stability of bargaining requires that actual changes be ignored. The merger of Brewery Workers into Teamsters was orchestrated by international representatives far removed from the employees in the bargaining unit, some of whose employment by Teamsters depended upon how many locals affiliated. "Affiliation" was accomplished by the local officers. The only participation by employees was by a group, roughly approximating in number those who had signed new authorization cards for Teamsters Local 1196, months after the fact and under circumstances in which they could not, because of the vote of members from other employers, have had an impact on the affiliation results.

Under the Act, the Board is charged with the responsibility to resolve questions of representation. The

question is whether the Board has the authority to abdicate its statutory responsibility in favor of union officers who have all to gain by the private vote. The potential adverse effect is demonstrated in this case. A majority of the employees petitioned to rid themselves of the union within a few months of the Board's decision. Is the policy of stabilizing collective bargaining so paramount that an unwanted union should be foisted upon employees whose voice, appropriately measurable in an election by the National Labor Relations Board, is denied expression?

In sum, certiorari should be granted to restore to employees rights in a change of bargaining representative equal to those in an initial selection.

2. The Decision Below Conflicts With The Decisions Of Another Court of Appeals On The Appropriateness Of The Amendment Of Certification Procedure.

The necessity for this Court to establish a proper balance between employee freedom of choice and bargaining stability is demonstrated by the conflict between the Sixth and the Third Circuits on the appropriateness of the amendment of certification procedure. *American Bridge Division, U.S. Steel Corp. vs. N.L.R.B.*, 457 F.2d 660 (3rd Cir. 1972); *N.L.R.B. vs. Bernard Gloekler North East Co.*, 540 F.2d 197 (3rd Cir. 1976).

In *American Bridge,* the leadership of an independent union of 304 members affiliated with the 1,120,000-member United Steel Workers of America. Pursuant to notice, a meeting was held of the membership, at which a representative of the Steel Workers spoke and answered questions. Subsequently, a vote was conducted. The Third Circuit's primary concern was whether a Board-supervised election under Section 9 was required, or whether the amendment of certification procedure was permissible. As in this case, the Board had amended the certification, predicated upon the union-run affiliation election. The Court concluded that the new union was something quite different from the earlier organization "because the people who conducted the substantial part of the unit dealings with management are no longer the association's officers, and the power of the unit's members to control those agents is radically changed. In other words, there is a clear question of representation: Will the unit's members be represented by their own local officers or by the Steel Workers Union? . . . The language of the existing contract, the local officers and the employees covered by the contract may be the same, but the rights of the parties have changed. By virtue of affiliation the new local becomes subject to the international constitution of Steel Workers Union . . ." 457 F.2d at 663. Accordingly, a Board supervised election was held to be essential.

Certain factors, identical in principle in this case, were primary considerations of that decision: (1) the lo-

cal union affiliated with an international union substantially larger and, (2) although certain local officers remained the same, the rights of the parties had been changed by the creation of new rights vested in the international; e.g., options to approve strikes and to assist in the adjustment of grievances.

In *Bernard Gloekler*, an independent union had a bargaining agreement with a company which, under Labor Board policy, barred an election. During the contract term, an affiliation vote was conducted as to joinder with the United Automobile, Aerospace, & Agricultural Implement Workers of America. The Court agreed with the company's refusal to deal with the new union, finding that the purported affiliation vote raised a question concerning representation which could not be addressed during the contract term.

As in *American Bridge*, the Court was persuaded by the change in the previous local's structure, administration, assets, membership, autonomy and bylaws — factors common to all three cases. The company was faced with a new union with new economic options and with a different focus of power. Consequently, the change in bargaining entity denied the efficacy of an amendment of certification and required, as the only available avenue, a Board supervised election.

This Court should grant certiorari to resolve the conflict between the circuits over the extent to which

the Board may bypass its own procedures to accord status to a changed bargaining representative.

3. The Decision Below Is In Conflict With Decisions Of This Court.

In its landmark decision authorizing the Board to impose bargaining order remedy based upon authorization cards, this Court acknowledged the superiority of the election process. *N.L.R.B. vs. Gissel Packing Co., Inc.*, 395 U.S. 575, 603 (1969).[1] In justifying its decision, the Court noted that there was, . . . "after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they do so by filing a representation petition." *Id.* at 613. As the Court pointed out, this was but a reiteration of its prior teaching that orders were not intended to fix a "permanent bargaining relationship without regard to new situations that may develop." A bargaining relationship must be permitted to "exist and function for a reasonable period" and have a "fair chance to succeed," but, after "such reasonable period the Board may, in a proper proceeding and upon a proper showing, take steps in recognition of changed situations which might make appropriate changed bargaining relationships." *Franks Bros. Co. vs. N.L.R.B.*, 321 U.S. 702, 705-706 (1944).

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1 Accord: "In terms of getting on with the problems of inaugurating regimes of industrial peace, the policy of encouraging secret elections under the Act is favored." *Linden Lumber Division vs. N.L.R.B.*, 419 U.S. 301-307 (1977).

The refusal of the Board to give recognition to the employee petition, *after* the amendment of certification, is inconsistent with the teachings of the above cases. This is not a situation in which the Board found a loss of majority resulting from the unfair labor practices of the employer. *Cf. Medo Photo Supply Corp. vs. N.L.R.B.*, 321 U.S. 678 (1944). There is no finding that any unfair labor practice of the Company contributed to the union's loss of majority. Assuming the premise underlying the Board's decision that there was no change in the bargaining representative, the relationship had been given a reasonable period in which to succeed. Indeed, it had borne fruition in two collective bargaining contracts.

The petition by the employees was following the directive and course which this Court has anticipated and approved: "If the employees are dissatisfied with their chosen union, they may submit their own grievance to the Board." *Brooks vs. N.L.R.B.*, 348 U.S. 96, 103-104 (1954).

The bargaining violation found by the Board, which was enforced without discussion by the Court below, is a technical one required by statute as the sole method to secure Court review of a Labor Board decision in a representation proceeding — here an amendment of certification. There was no finding that it contributed to any loss of majority support. Indeed, no bargaining had been postponed as a result of the company's action at the time the petition was filed. There was no con-

tention of violations of the collective bargaining agreement then in effect except the transfer of a holiday and the company's refusal to remit to Teamsters Local 1196 those dues authorized for checkoff to Local 196.[2]

The Labor Board itself initially recognized in its first decision that a valid question concerning representation had been raised and its original order to bargain terminated with the conclusion of the contract. (Appendix 155) Subsequently, after vacating its first decision (Appendix 145-148), the Board directed future bargaining.[3]

The refusal to give effect to the subsequent employee petition presents another aspect of the Labor Board's mechanistic treatment of union affiliation proceedings in which it has adopted a policy of ignoring the realities of change which require employee participation. The policy evidences a logical contradiction. It requires bargaining for a reasonable time, as in the establishment of a bargaining relationship, yet, at the same

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2 The second case upon which certiorari is sought originated in the U.S. District Court to compel arbitration of these issues under Section 301 of the National Labor Relations Act.

3 In *Mission Mfg. Co.*, 128 NLRB 275, the Board permitted withdrawal of recognition upon valid considerations and omitted a bargaining obligation in its remedial order. In *Midwestern Instruments, Inc.*, 133 NLRB 1132, the Board required bargaining when requested only "by a majority representative of [Respondent's] employees" and left for appropriate proceedings, the determination if there were such representatives. This was despite a finding of a refusal to bargain on merit increases. There was evidence of the loss of majority by the union, but the refusal to bargain had not contributed to the loss of majority.

time, insists that the relationship is but a continuation of the old.

A fundamental and necessary concomitant of this Court's decisions in bargaining order cases has been its confidence that, having been given a reasonable chance to succeed, a bargaining situation may be changed or eliminated by employee free choice through Board procedures. Any bargaining remedy which perpetuates a bargaining relationship when a union's loss of majority was not induced by employer unfair labor practices ignores the essential balance contemplated in the Court's support of bargaining orders with a minority union. A federal court should not "foist upon the employees an order to bargain with a union which they, according to their latest decision, no longer regard as the representative of their choice."[4]

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4 *N.L.R.B. vs. Patent Trader, Inc.*, 415 F.2d 190, 200 (2nd Cir. 1969).

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted this ____ day of May, 1980.

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CERTIFICATE OF SERVICE

In accordance with the provisions of Rule 33 of the Supreme Court rules, I certify that I have caused a copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to be served on the following persons by mailing three copies of same via certified mail, return receipt requested, postage prepaid;

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